

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FILED

MAR 22 2010

U.S. DISTRICT COURT
ELKINS WV 26241

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U.S. DISTRICT COURT
ELKINS WV 26241

KELVIN LORENZO MCDANIEL,

Petitioner,

v.

Civil Action No. 2:07 CV 99
(Maxwell)

JOE D. DRIVER,

Respondent.

ORDER

It will be recalled that on December 4, 2007, *pro se* Petitioner Kelvin Lorenzo McDaniel instituted the above-styled civil action by filing a Petition For Writ of Mandamus. In his Petition, the Petitioner asserts that he is entitled to be considered for immediate transfer to a Community Correctional Center without regard to the 10% rule and in accordance with 18 U.S.C. § 3621(b) and the Bureau of Prisons' pre-2002 practices.

It will further be recalled that the case was referred to United States Magistrate Judge James E. Seibert for initial screening and the preparation of a Report and Recommendation.

On December 31, 2007, United States Magistrate Judge James E. Seibert

issued a Report And Recommendation wherein he recommended that the Petitioner's Petition For Writ of Mandamus be denied and dismissed and the above-styled civil action stricken from the docket. In making this recommendation, Magistrate Judge Seibert found that this Court lacked the authority to order that the Petitioner be immediately transferred to a Community Correctional Center; that, to the extent that the Petitioner was challenging the Bureau of Prisons' "10%" rule with respect to Community Correctional Center placement, said issue was not ripe for review in light of the fact that the Petitioner was not within eleven to thirteen months of his projected release date; and that, even were the Petitioner entitled to Community Correctional Center consideration, he was not entitled to a Writ of Mandamus because he had another means available to him to attain the desired relief, namely a writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging the Bureau of Prisons' failure to consider him for Community Correctional Center placement.

In his Report And Recommendation, Magistrate Judge Seibert provided the parties with ten (10) days from the date of said Report And Recommendation in which to file objections thereto and advised the parties that a failure to timely file objections would result in the waiver of his right to appeal from a judgment of this Court based upon said Report And Recommendation.

The Petitioner's Written Objections to Magistrate Judge Seibert's Report And Recommendation were filed with the Court on January 15, 2008.

Upon an independent *de novo* consideration of all matters now before the Court, it appears to the Court that the issues raised by the Petitioner in his Petition For Writ of Mandamus were thoroughly considered by Magistrate Judge Seibert in his Report And Recommendation. Furthermore, upon consideration of the Petitioner's Written Objections to Magistrate Judge Seibert's Report And Recommendation, it appears to the Court that the Petitioner has not raised any issues that were not thoroughly considered by Magistrate Judge Seibert in said Report And Recommendation. Moreover, the Court is of the opinion that Magistrate Judge Seibert's Report and Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in the above-styled civil rights action. Accordingly, it is

ORDERED that the Report And Recommendation entered by United States Magistrate Judge James E. Seibert on December 31, 2007, be, and the same is hereby, **ACCEPTED** in whole. Accordingly, it is

ORDERED that the Petitioner's Motion For Writ of Mandamus (Docket No. 1) be, and the same is hereby, **DENIED**. It is further

ORDERED that the Clerk of Court shall enter judgment for the Respondent. It is further

ORDERED that, should the Petitioner desire to appeal the decision of this Court,

written notice of appeal must be received by the Clerk of this Court within sixty (60) days from the date of the entry of the Judgment Order, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The \$5.00 filing fee for the notice of appeal and the \$450.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, the Petitioner may, in accordance with the provisions of Rule 24(a) of the Federal Rules of Appellate Procedure, seek leave to proceed *in forma pauperis* from the United States Court Of Appeals For The Fourth Circuit.

The Clerk of Court is directed to transmit a copy of this Order to the *pro se* Petitioner.

ENTER: March 22 2010

A handwritten signature in black ink, reading "Robert E. Maxwell", is written over a horizontal line.

United States District Judge